The Commentator

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Justice Breyer: Supremely Low Key & Judiciously Cosmopolitan

By Ben Kleinman, JD '08

In an informative and entertaining talk that lacked the fireworks of other Supreme Court Justice appearances at NYU, Justice Stephen Breyer gave several hundred members of the NYU community a tour through his typical day, a dissertation on the travails of having judicial theories, and a delicately candid assessment of his views and his critics.

Physically, Breyer evoked a kindly uncle or grandfather. Members of the audience were overhead later comparing the Justice to PBS's Fred Rogers. That impression was probably amplified by the introduction, which referred to his being an Eagle Scout, being a national authority on regulation and administrative law while at Harvard, and having been on the national sentencing commission (while helping to create Harvard's loan forgiveness program).

The Court's Impact

Putting the role of a Supreme Court justice in context, Breyer described the minimal role that federal courts and statutes play in everyday life. He remarked that "90% or so of the law in the United States is not federal law" and that outside of federal law is "almost all family law, almost all business law, almost all criminal law..." Family law is arguably the most important law to many people, and that has nothing to do with the Supreme Court, according to Breyer.

Breyer then moved on to what the Supreme Court does do. Of the estimated 8 million original cases in the US about 8,000 result in petitions to the Supreme Court each year. Eighty are heard. So a Supreme Court justice has two jobs: (1) getting from 8000 to 80 and (2) deciding the 80.

A Justice & His Clerks

Quoting Chief Justice Taft, Breyer indicated the "job of the Supreme Court is to create a uniform rule of federal law in cases that call for it." It's rare that a case calls for it when there is consensus. One exception Breyer cited is the Guantanamo cases that seem to merit a national decision despite circuit court consensus. But when there is a split in the circuits, the Supreme Court settles it. Why? "We are of course brilliant," quipped Breyer, but it's more important that *someone* have the last word than that the last word be infallible.

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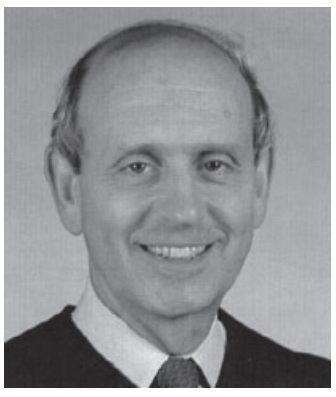
A typical case has 10-12 briefs, although a recent right to die case had 70 briefs and an affirmative action case had 120. Even in those cases Breyer found that the briefs weren't repetitive and he read every one. His clerks prepare a memo on each case which he then discusses with them.



Supreme Court Justice Stephen Breyer

For Breyer and his colleagues, the actual hearings are more of an opportunity to communicate with each other than to learn new items about the case.

After 11 years, Breyer is still the junior member and will be even if Roberts is confirmed. So his job during conference is to answer the door if someone knocks. At this stage decisions are tentative and everyone writes down what others say in case it's useful for an opinion. The professional attitude is maintained: Breyer has "never head a voice raised in anger. Never. Never heard one judge say anything slighting of another."

On the basis of tentative votes the Chief (or senior justice in the tentative majority) will assign an opinion writer. The minority side will do the same. When assigned an opinion, Breyer's law clerks prepare a first draft that Breyer usually rewrites at least twice. When it's done, he circulates it to attract joiners.

At the next meeting the Chief Justice makes sure everyone's joined an opinion or written one. A handful of times each year a justice may change sides during the consideration interval.

Judicial Transparency

With a judicial job, "what you see is what you get". But that's not true of the legislature, says Breyer. "A statute doesn't explain why it says what it says but a good judicial opinion will say why the judge reaches that decision. If you look at our drafts, you'd see what you see eventually, just [written] worse."

Science & Martial Law

In response to a question about social science in the courts Breyer said that the material comes to their attention through briefs and it's unlikely that legal outcomes turn on it. "Scalia, Kennedy, I, and others have perhaps inadvisably quoted poetry and novels." Further, there are no fixed rules about the legislative facts used in making statutes and the court has "taken such matters for what they're worth."

A question was asked about martial law in the context of natural disasters, and Breyer doubted that we'd lose all civil liberties in such a case. We'd still have protections. "They might not be the same, but they're there."

Continued on page 2

SLAP Image of the Week by Gillian Burgess

NYU Welcomes Class of 2008

Also greets large transfer class and Tulane students.

By Jackson Eaton '07'

An emergency medical technician, a bagpiper, a championship chess player, a carpenter—what do they all have in common? They're all members of the class of 2008.

In an interview, Dean of Admissions Ken Kleinrock spoke to the highlights of this year's admissions process, from the unusually large numbers of transfer students to applications from victims of Hurricane Katrina.

Ken Kleinrock, Assistant Dean for Admissions

New 1Ls

7,872 would-be law students applied to NYU, according to Kleinrock. Though slightly fewer than last year, he attributes the lower number to a growing economy. In line with recent years, roughly twenty percent of applicants were given offers, and of those just under 30% accepted.

Like last year, a few dozen students were chosen from the wait list. One student was admitted the day before school began.

For the first time, Duke claimed the rank of the top "feeder school" to NYU Law. Bobcat alumni took second place this year, the highest ranking yet of NYU undergrads.

This year's 1L class has 46-54 female-male ratio. One-third come straight from senior year of college. Almost half have spent 1-4 years out of college, while nearly a fifth have been out 5 years or more. 14% of 1Ls hold an advanced degree.

Plenty of Transfers

68 students transferred from other schools into this year's 2L class, an unusually high number. Kleinrock indicated that NYU aims to get about 50-55 2L transfer students.

Kleinrock explained it was very difficult to predict which transfers would accept offers. Last year, a similar number of offers resulted in only 43 admitted transfers.

Some students have suspected that the school enjoys a lower-sized 1L class for its advantages in law school rankings, while reaping the tuition dollars of transfer students who are not counted toward class sizes. Kleinrock dispelled this suggestion.

"We admitted these numbers of transfer students well before rankings," he said. Moreover, he said, even if they did count they would play a small role in NYU's ultimate ranking compared to factors like student LSAT scores and GPA.

Transfer students, he explained, benefited from the wide breadth of courses available to second and third year law students, without significantly altering the nature of the student body.

"You couldn't put those students in a first year curriculum without having a five-section class," he said.

325 students applied for transfer admission. Although some applied because changing circumstances caused them to look to New York — for instance, a spouse with a new job in the city, most applied because of the tremendous educational and professional opportunities that NYU offers. For many, NYU had been a top choice when they originally applied to law school.

Help to Tulane

NYU Law offered admission to 10 3Ls from Tulane in the aftermath of Hurricane Katrina. However, because many peer law schools similarly relaxed application deadlines only two students accepted admission.

Kleinrock was particularly proud of the speed of the response of the Law School. Hurricane Katrina made landfall on August 29. By September 2, under the coordination of Vice Dean Clayton Gillette, NYU announced its willingness to accept law students

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Editorials & Letters p. 4

Arts and Lesisure p. 6

SLAP Season News p. 8